IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE CERTAIN ARGUMENT, QUESTIONING, OR INTRODUCTION OF "EVIDENCE" BY DEFENDANTS PERTAINING TO THE STATE'S REGULATION OF POULTRY WASTE (DKT. NO. 2422)

Plaintiffs' *Motion in Limine to Preclude Certain Argument, Questioning, or Introduction of "Evidence" by Defendants Pertaining to the State's Regulation of Poultry Waste*, Dkt. No. 2422 (Aug. 5, 2009) ("Motion"), seeks, in effect, to exclude any argument, testimony or evidence concerning the scope, purpose or effect of Oklahoma's[1] comprehensive poultry litter laws and regulations, or the Animal Waste Management Plans ("AWMPs") promulgated pursuant to them. Plaintiffs' demand is remarkable given that Plaintiffs allege violations of these very laws. *See* Second Amended Complaint, Dkt. No. 1215 ¶¶127-135 (Counts 7 & 8). Plaintiffs' demand is all the more remarkable given that the conduct Plaintiffs challenge—the land application of poultry litter as a fertilizer and soil conditioner—is performed every day in the Oklahoma-portion of the IRW by farmers, ranchers and litter applicators in reliance upon field-specific AWMPs issued by the State of Oklahoma pursuant to these very laws.[2] Plaintiffs would dismiss such evidence as irrelevant. *See* Mot. at 12. However, these regulations and plans, and the characterizations that Plaintiffs seek to exclude, are plainly relevant to the determination of the appropriate amount of fertilizer for each field (or how much is "too much" poultry litter), the State's authorization of the conduct in question, as well as motive, bias and

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[1] Plaintiffs' Motion makes no reference to the statutes and regulations enacted by the State of Arkansas, which likewise authorize, permit and promote the land application of poultry litter in accordance with the requirements set forth therein. *See* Dkt. No. 2033 at pp. 3-4 ¶¶5-8, pp. 17-20; Dkt. No. 2055 at pp. 3-4 ¶¶5-8, pp. 13-19; *see* Ark. Code Ann. § 15-20-902; Ark. Code Ann. § 15-20-1102; Ark. Code Ann. § 15-20-901, *et seq.*; Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 1901.1, *et seq.*; ANRC Reg. 2001.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; ANRC Reg. 2201.1, *et seq*; *see, e.g.*, Dkt. No. 2033 Exs. 16-17. As the Court concluded during the recent summary judgment hearings, Arkansas statutory and common law applies to allegations concerning conduct occurring in Arkansas. *See* Transcript of August 18, 2009 Hearing (Transcript not yet available). Accordingly, Plaintiffs' Motion does not request exclusion of evidence, testimony or argument with respect to conduct authorized by Arkansas law—a request that should nevertheless be denied based on the same authority detailed herein.

[2] These issues were briefed extensively in connection with the parties' summary judgment motions. *See, e.g.*, Dkt. No. 2033 at 17-21 (May 11, 2009); Dkt. No. 2055 at 13-19 (May 15, 2009); Dkt. No. 2231 at 6-7 (June 12, 2009); Dkt. No. 2236 at 7-8 (June 16, 2009).

state of mind. Accordingly, the argument, testimony and evidence in question is admissible.

LEGAL STANDARD

"All relevant evidence is admissible," except if otherwise provided by law. Fed. R. Evid. 402. Evidence is considered relevant in the event it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "'The determination of whether the evidence is relevant is a matter within the sound discretion of the trial court.'" *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995) (quoting *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 566 (10th Cir. 1978)).

ARGUMENT

The statutes, regulations and arguments to which Plaintiffs object are relevant evidence of the fact that the State of Oklahoma, by statute and through its employees and agents, authorizes the land application of poultry litter. Plaintiffs object to Defendants' construction of these statutes and regulations and ask the Court to quash, before hearing any evidence, any suggestion that the State: issues permits to apply litter, issues AWMPs, or approves or promotes[3] the application of poultry litter; that an AWMP authorizes the application of poultry litter at any particular rate; or that compliance with an AWMP satisfies a Grower's obligations under Oklahoma law. *See* Mot. at 1 (listing purportedly objectionable characterizations). But,

[3] Plaintiffs' Motion focuses exclusively on Defendants' characterization of Oklahoma's poultry litter regulatory scheme. However, the arguments that Plaintiffs seek to exclude are supported by other evidence as well. For example, as the Court well knows, the State of Oklahoma, through Oklahoma State University, maintains a poultry litter marketplace which facilitates the buying and selling of poultry litter. *See* Dkt. No. 2057 Exs. 19-20. Additionally, the "Oklahoma Conservation Commission teach[es] people how to … apply … and use litter in the IRW," Peach Dep. at 79:3-9 (Dkt. No. 2057 Ex. 17), and the State itself purchases and uses poultry litter as a fertilizer on its own property in the IRW, *see* Dkt. No. 2069 at 9 ¶25. The State, presumably, would seek to exclude such evidence as well, which is plainly admissible and relevant.

arguments and evidence as to these points are proper and admissible in the first instance because they are true. Oklahoma does, in fact, do each of these things. Moreover, even if the law is not clear as to each of Plaintiffs' objections, the extent to which Oklahoma does these things will be a disputed issue at trial on which Defendants will offer evidence and argument for the fact finder to weigh. Plaintiffs' effort to exclude any such evidence or argument prior to trial is improper and wholly unsupported.[4]

I. Evidence and Argument Regarding Oklahoma's Regulation and Authorization of the Land Application of Poultry Litter is Relevant and Appropriate

The Oklahoma Legislature enacted the Registered Poultry Feeding Operations Act ("RPFO Act"), the Oklahoma Poultry Waste Applicators Certification Act ("Applicators Act"), and the other statutes referred to by Plaintiffs specifically, as Plaintiffs admit, to regulate the land application of poultry litter in Oklahoma. *See* Mot. at 2; Dkt. No. 2166 at 18. The RPFO Act requires that "[e]very poultry feeding operation shall have an [AWMP]" and requires every such operation to comply with the detailed, field-specific application rates and instructions set forth therein.[5] 2 Okla. Stat. § 10-9.7(C); Okla. Admin. Code § 35:17-5-3(b); *see, e.g.*, Dkt. No. 2057 Exs. 21-25 (Oklahoma AWMPs). These statutes and regulations, the AWMPs promulgated under them, and the manner in which they are enforced and relied upon in practice, clearly demonstrate that Oklahoma authorizes the use of poultry litter in conformance with the field-specific application rates, instructions, terms and conditions set forth in each AWMP. *See* Dkt. No. 2057 at 17-22; Dkt. No. 2254 at 1-7.

[4] Tellingly, Plaintiffs do not reference a single authority for the proposition that such argument, testimony or evidence may be excluded pursuant to Federal Rules of Evidence 401 and 402.

[5] The regulations enacted pursuant to the Applicators Act mirror the RPFO Act by requiring Non-Growers to obtain and comply with the instructions set forth in AWMPs or "Conservation Plans" incorporating "the most recently published [USDA] Natural Resources Conservation Service Waste Utilization Standards." 2 Okla. Stat. §§ 10-9-19, 10-9-19(a).

A. Oklahoma Issues AWMPs that Authorize the Application of Poultry Litter

Plaintiffs' protestations to the contrary notwithstanding, *see* Mot. at 4, the State plainly issues AWMPs. The Oklahoma Legislature expressly authorized and approved the drafting and issuance of AWMPs on behalf of the State "by the USDA NRCS or an entity approved by the State Department of Agriculture" such as the Oklahoma Department of Agriculture, Food and Forestry (ODAFF). Okla. Admin. Code § 35:17-5-3(b)(3). As noted in the recent oral arguments before the Court, state officials control the process of issuing the AWMPs. As a result, Oklahoma AWMPs bear ODAFF's name and seal. *See, e.g.*, Dkt. No. 2057 Exs. 21-25. And, in the event a farmer or applicator fails to abide by the terms of the relevant AWMP, the State will punish such violation. *See* 2 Okla. Stat. §§ 10-9.11, 10-9.12. For all of the creative agency theories Plaintiffs propose in this case, it is difficult to see how Plaintiffs may contend that AWMPs are not drafted, issued and approved by state employees or the State's legally authorized agents pursuant to the clear mandates of the law.

Next, each AWMP clearly approves the application of poultry litter on specific fields at certain times, in certain quantities and in certain locations, subject to the terms and conditions set forth therein. AWMPs specify a "land application rate[]" for poultry litter based on "a soil test and current [USDA Natural Resources Conservation Service (NRCS)] phosphorus standards." 2 Okla. Stat. § 10-9.7(C)(5); Okla. Admin. Code § 35:17-5-3(b)(6), (7). Each similarly states that "[t]he law requires that the [NRCS] recommendations for litter application rates be followed," and details the specific time, location and amounts of poultry litter that may be applied to each parcel of land based on the results of soil tests and current NRCS standards.[6] *See, e.g.*, Dkt. No.

[6] The NRCS standards adopted by the Oklahoma Legislature express the Legislature's best judgment as to the appropriate balance between the agricultural and economic benefits from the use of poultry litter as a fertilizer and sound environmental protections. *See* Dkt. No. 2057 at 20-21. The stated intent of the Legislature in enacting environmental statutes is:

2057 Exs. 21-25. Every registered poultry feeding operation is required to have an AWMP to use poultry litter, and litter applicators are required to apply litter only pursuant to such a plan. *See* 2 Okla. Stat. §§ 10-9.7(C), 10-9.19(a).

Plaintiffs respond that an AWMP is merely "guidance." Mot. at 4. But, they do not dispute that a farmer cannot apply poultry litter without an AWMP (the very definition of authorization), or that any farmer who fails to follow this "guidance" will be subject to serious penalties. *See* 2 Okla. Stat. §§ 10-9.11, 10-9.12. Plaintiffs further argue that these plans are but one of a number of rules and regulations to which a farmer is subject—noting, for example, the general injunction that there be no "[d]ischarge or runoff from the application site." *See* Mot. at 3-8 (citing 2 Okla. Stat. §§ 10-9.7(B)(4), (C)(6)(c); Okla. Admin. Code § 35:17-5-5. But what Plaintiffs fail to mention is that the State's employees and/or agents who write these plans are themselves required by law to take into account each of these "other rules" in drafting AWMPs, and to design each AWMP to ensure compliance with these requirements. The RPFO Act expressly states that "the procedures documented in the [AWMPs] must ensure" compliance with these prohibitions and requirements by tailoring the "[t]iming and rate of applications … based on assimilation capacity of the soil profile, assuming usual nutrient losses, expected precipitation, and soil conditions." 2 Okla. Stat. §§ 10-9.7(B)(4), (C)(6)(c); Okla. Admin. Code § 35:17-5-5. Plaintiffs often point the Court to the general injunction that "[d]ischarge or runoff of waste from the application site is prohibited," Mot. at 4, but Oklahoma law is clear that *the*

> to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters *without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters.*

27A Okla. Stat. § 2-6-102 (emphasis added). In authorizing the application of poultry litter, the Oklahoma Legislature expressly satisfied this requirement by finding that the adoption of the NRCS standards and related regulations shall "assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the State." Okla. Admin. Code § 35:17-5-1.

plan writers are specifically required to create a plan to "ensure that the … [d]ischarge or runoff of waste from the application site is prohibited." *Id.* § 10-9.7(C)(6)(c). In fact, as noted in the recent oral arguments, the State's plan writers have admitted that the plans are written to comply with this standard, and that a farmer who follows his AWMP is therefore in compliance with Oklahoma law. *See, e.g.*, Dep. of John Littlefield, ODAFF Poultry Compliance Inspector, at 108:13-19 (Aug. 2, 2007) (Dkt. No. 2254 Ex. H); Dep. of Ed Abernathy, ODAFF Soil Scientist/AWMP Writer, at 36:3-25 (Mar. 26, 2009) (Dkt. No. 2254 Ex. G). Thus, each AWMP already takes into account the "other rules" to which Plaintiffs point. *Compare* Mot. at 3-8; *with* 2 Okla. Stat. §§ 10-9.7(B)(4), (C)(6)(c); Okla. Admin. Code § 35:17-5-5.

The manner in which AWMPs are designed, enforced and used in the field likewise demonstrate that the State does authorize the application of poultry litter (both generally and on each specific field). At trial, the fact finder will hear evidence of how Oklahoma's poultry litter and other environmental statutes are enforced. For example, as noted above, the evidence from the Oklahoma employees and agents charged by statute with developing such plans is that they design plans that consider *all* of the requirements in Oklahoma law to prevent runoff to the waters of the State. *See* Pham Dep. at 27:1-9, 31:19-33:3, 62:25-63:23 (Dkt. No. 2254 Ex. F); Abernathy Dep. at 36:3-25 (Dkt. No. 2254 Ex. G); Littlefield Dep. at 108:13-19 (Dkt. No. 2254 Ex. H); Thompson Dep. at 16:15-22:25, 31:7-23 (Dkt. No. 2057 Ex. 30); 2 Okla. Stat. § 10-9.1(B)(1) ("'AWMP' means a written plan that includes a combination of conservation and management practices *designed to protect the natural resources of the state* as required by the State Department of Agriculture pursuant to the provisions of … this act."). Moreover, the fact finder will hear evidence from growers, farmers, ranchers and poultry litter applicators regarding their reliance upon and compliance with AWMPs. Specifically, they will testify that they understand AWMPs to be litter application permits that are developed to be protective of the

environment, that they rely on the State's experts to make those judgments, and that compliance with the strict terms of an AWMP constitutes compliance with all applicable environmental laws. *See, e.g.*, Butler Dep. at 244:9-245:12 (Ex. A); Saunders Dep. at 90:13-21 (Ex. B).

Site-specific authorizations of the sort contained in AWMPs must be construed as a permit. As the Ninth Circuit recognized in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001), this is true even when the specific instructions are given against the backdrop of more general prohibitions against pollution of the waters of the State.[7] Plaintiffs have failed to identify any contrary instance in which a document as detailed and site-specific as an Oklahoma AWMP, setting forth precise discharge or application rates, was held to be mere "guidance" as opposed to legal authorization. Indeed, the law is clear that "[a] specific statute will control over a conflicting general statute on the same subject." *See Russell v. Chase Inv. Servs. Corp.*, __ P.3d __, 2009 WL 983541, at *5 (Okla. Apr. 7, 2009); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quotations, emphasis omitted). To conclude otherwise would render Oklahoma's poultry litter laws largely hortatory, and leave the farmers, growers, ranchers and applicators who conduct business every day in reliance on those laws in a legally untenable position.[8]

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[7] *See id.* at 870 ("Because [plaintiff] failed to show that the [utilities] violated the NPDES permits … any pollutants discharged into the storm water were permissible."); Cal. Water Code § 13304(A) (general provisions prohibiting "any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance").

[8] The federal Constitution prohibits the application of penalties "where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963); *see Champlin Refining Co. v. Corp. Comm.*, 286 U.S. 210, 242-43 (1932) (holding law prohibiting production of "waste" unconstitutional because "[t]he meaning of the word 'waste' necessarily depends upon many factors" and is "vague and indefinite"); *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926). Here, Plaintiffs would

Plaintiffs' insistence that Oklahoma law requires the Court to enjoin each and every application of poultry litter, despite the issuance by the State of plans setting forth site-specific litter application rates, results in an impossible and absurd construction of Oklahoma law. Statutes ought not be read in this manner. *See Crutchfield v. Marine Power Engine Co.*, 209 P.3d 295, 305 (Okla. 2009); *In re Holt*, 932 P.2d 1130, 1134 (Okla. 1997); *see also EEOC v. Comm'l Office Prods.*, 486 U.S. 107, 120-21 (1988); *United States v. Am. Trucking Assns.*, 310 U.S. 534, 543 (1940).[9] In this lawsuit, Oklahoma is simply at war with itself, and Plaintiffs' numerous and baseless efforts through motions in limine to prevent Defendants from presenting that fact at trial must be rejected. For the foregoing reasons, the laws, regulations and characterizations thereof to which Plaintiffs object are appropriate, relevant and admissible.

II. Plaintiffs' Alternative Arguments which Seek to Limit Defendants' Ability to Introduce Argument, Testimony and Evidence Regarding Compliance With Oklahoma's Poultry Litter Laws and Regulations Should be Rejected

Plaintiffs' arguments seeking alternative relief are also incorrect. Plaintiffs argue first that evidence regarding Oklahoma's litter regulations are "irrelevant with respect to all of the State's claims except those founded on violations of the [RPFO] Act (Count 8)." Mot. at 12. Second, they assert that the characterizations to which they object are irrelevant because

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require that farmers and ranchers follow the specific instructions contained in AWMPs while *also* ensuring—through unspecified means—that "pollution" or "runoff" does not or is not likely to result. *See* Mot. at 2-11. Yet, nowhere do Plaintiffs even attempt to explain how—absent the specific instructions in the AWMPs—farmers would be able to decipher the amount of poultry litter that may be used at any given time or location to avoid such "pollution" or "runoff." Indeed, Plaintiffs' own expert could not even identify the levels of phosphorus or bacteria that would constitute "pollution" as defined by these statutes. *See* Fisher Dep. I at 459:3-461:24 (Dkt. No. 2057 Ex. 29).

[9] Indeed, Plaintiffs' interpretation would invalidate numerous regulatory regimes. For example, the operators of wastewater treatment plants in Oklahoma would be liable for violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1(A) as a result of their release of phosphorus compounds in each wastewater discharge, despite the presence of regulations and permits authorizing such conduct. *See* Dkt. No. 2069 at 13-14 ¶¶49-53 (documenting state-authorized phosphorus discharges from wastewater treatment plants); 27A Okla. Stat. § 2-6-205.

Defendants have not provided affirmative evidence that *every* application of poultry litter in the IRW is performed in compliance with an AWMP. Mot. at 14. Both arguments are misplaced.

A. Evidence related to the State's Authorization of the Land Application of Poultry Litter Is Relevant to All of Plaintiffs' Remaining Claims

The argument, testimony and evidence that Plaintiffs challenge is relevant to each of Plaintiffs' remaining claims.[10]

State Statutory Claims (Count 7). The extent to which the Oklahoma Legislature has approved the application of poultry litter is clearly relevant in determining whether the land application of poultry litter has or is "likely to" "cause pollution of any waters of the state" in violation of the general statutory provisions at issue in Count 7. 27A Okla. Stat. § 2-6-105(A); 2 Okla. Stat. § 2-18.1(A). As discussed above, Oklahoma employees and agents are responsible for developing site-specific plans that take into account each of the legislature's injunctions to protect the environment. *See supra* at 5-7. Moreover, farmers and applicators are required to obtain and abide by such a plan. Therefore, these specific requirements should satisfy Oklahoma's general requirements to be protective of the environment. *See supra* at 7-8.

Further, even if these general statutes could be interpreted independent of the specific poultry litter laws and regulations, the argument, testimony and evidence in question is relevant and admissible concerning the penultimate ruling as to whether these laws have been violated. The manner in which the State develops and enforces AWMPs is certainly relevant to whether litter applied consistent with an AWMP is "likely" to cause pollution. 27A Okla. Stat. § 2-6-105(A). Similarly, such evidence and argument is relevant to whether the litter has been "given the degree of treatment or … such other measures as necessary to protect the legitimate beneficial uses of such waters" as required by Oklahoma law. 27A Okla. Stat. § 2-6-102. Because the statutes

[10] Given the Court's denial of Plaintiffs' motion for reconsideration of the July 22, 2009 Opinion and Order, *see* Dkt. No. 2472, Defendants do not address Plaintiffs' CERCLA claims.

do not define the term "pollution," the finder of fact must be permitted to hear evidence, testimony and argument with respect to these issues.

Common Law Claims (Counts 4, 5 & 6). The evidence and argument Plaintiffs seek to exclude are also relevant to specific elements of Plaintiffs' claims for both nuisance and trespass. First, the regulatory regime is relevant to both the nuisance and trespass claims in light of the statutory and common law principle that "nothing … done or maintained under the express authority of a statute can be deemed a nuisance" or trespass. 50 Okla. Stat. § 4; *see* Restatement (Second) of Torts § 211 (a person acting pursuant to a "duty or authority … created by legislative enactment" cannot be held liable for an invasion of land in possession of another); *see, e.g.*, *Carson Harbor*, 270 F.3d at 870 (applying rule to dismiss claims of nuisance and trespass). Second, with respect to Plaintiffs' nuisance claims, evidence related to the use of poultry litter as a fertilizer in accordance with the specific rates and instructions contained in AWMPs constitutes evidence that a fact-finder may consider in reaching a ruling as to whether or not the land application of poultry litter constitutes an "*unwarrantable, unreasonable or unlawful* use by a person of his own property to the injury of another." *B.H. v. Gold Fields Mining Corp.*, 506 F. Supp. 2d 792, 800 (N.D. Okla. 2007).[11] Finally, the State's regulations are relevant to Plaintiffs' trespass claim because no trespass may exist where the invasion has been consented to by the land owner.[12]

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[11] *See id.* ("Common law nuisance is defined more broadly as the 'unwarrantable, unreasonable or unlawful use by a person of his own property to the injury of another.'") (quoting *Lyons v. McKay*, 1957 OK 180, 313 P.2d 527, 529 (Okla. 1957)); *Briscoe v. Harper Oil Co.*, 1985 OK 43, 702 P.2d 33, 36 (Okla. 1985).

[12] The state's authorization of the use of poultry litter is relevant here because, to establish their trespass claim, Plaintiffs must prove that the State owns and maintains an exclusive possessory property interest in the land in question. *See* Dkt. No. 2055 at 8-13. Of course, Plaintiffs will be hard-pressed to do so given the Cherokee Nation's interests in the natural resources in question. *See* Dkt. No. 2362 (July 22, 2009).

RCRA Claim (Count 3). The manner in which Oklahoma regulates the use of poultry litter, and the manner in which farmers, ranchers and applicators understand those regulations, is relevant to Plaintiffs' RCRA claim. RCRA defines "solid waste" as material that has been "discarded" or "thrown away." *See Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 55-56 (D.C. Cir. 2000); *Am. Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987).[13] As Defendants will demonstrate at trial, poultry litter contains numerous macro- and micro-nutrients in addition to phosphorous, all of which agronomically benefit crop growth. Moreover, Defendants will demonstrate that these AWMPs are designed to maximize the agronomic benefits to be had from these many beneficial properties while eliminating runoff of excess nutrients to the waters of the States. Poultry litter applied in compliance with a plan developed in this manner is necessarily beneficially applied, and not simply "discarded material." Evidence regarding what precisely Oklahoma permits under its poultry litter regulatory scheme is therefore highly relevant evidence of whether poultry litter is "solid waste" under RCRA.

General Evidence. The evidence to which Plaintiffs object is moreover generally relevant to Plaintiffs' case and claims.

First, what the State permits and how it is perceived is relevant evidence as to the state of mind of Defendants, and the Growers and non-party farmers and ranchers that actually apply poultry litter as fertilizer in the IRW. Plaintiffs have alleged intentional torts, claiming that Defendants and/or Defendants' agents acted intentionally and knowingly in violation of the law. *See*, *e.g.*, SAC ¶¶ 43, 47-57, 98, 101, 106, 109-12, 114, 117, 120, 125. Whether or not the activity is authorized by law is therefore relevant evidence on which Defendants, Growers and

[13] In denying Defendants' motion for summary judgment as to RCRA, the Court necessarily determined that EPA has not issued an authoritative determination as to whether poultry litter is a RCRA-covered solid waste.

non-party farmers and ranchers might have relied upon in determining whether poultry litter application is permissible under the law.

Second, the Legislature's authorization of the land application of poultry litter is relevant to the scope of any injunction entered in this litigation. The issuance of injunctive relief is within the sound discretion of the court. *See Hecht v. Bowles*, 321 U.S. 321, 329 (1944). In the event that Defendants are found to be liable under any of the remaining claims, the Court should take into account existing poultry litter regulations, as well as the impact that an injunction may have on existing state programs in both Oklahoma and in Arkansas. *See Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001) ("In determining the scope of injunctive relief that interferes with the affairs of a state agency, we must ensure, out of federalism concerns, that the injunction 'heels close to the identified violation,' and is not overly 'intrusive and unworkable . . . [and] would not require for its enforcement the continuous supervision by the federal court over the conduct of [state officers].'") (quoting *Gilmore v. California*, 220 F.3d 987, 1005 (9th Cir. 2000); *O'Shea v. Littleton*, 414 U.S. 488, 500, 501 (1974)); *see also Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 41 (1909) ("The case must be a clear one before the courts ought to be asked to interfere [by injunction] with state legislation upon the subject of [gas] rates…."). Further, consideration of the existing regulations and enforcement by pertinent agency officials is particularly relevant where, as here, the ruling "involves technical or scientific matters within the agency's area of expertise." *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006) ("Deference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise.") (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

Third, evidence that the Legislature and the state regulators have authorized the application of poultry litter in accordance with rates and requirements set forth in AWMPs—and

to date have not identified any violations thereof—is relevant to Plaintiffs' motivations for filing this lawsuit. In presenting their case, Plaintiffs will doubtless purport to be representing the public good on behalf of the government and people of Oklahoma. Indeed, particularly if this case is tried to a jury, such a presentation will be calculated to place Defendants in a poor light while ascribing altruistic motives to Plaintiffs and their counsel. Defendants have every right to counter any such presentation. It is well established that a party's motivations in bringing a lawsuit are relevant evidence of bias and motive.[14] Here, the fact that Plaintiffs are advancing a legal theory that is at odds with the view of the Oklahoma Legislature and the professional state regulators who are charged day in and day out with protecting the environment, health and safety of Oklahoma and Oklahomans, and inconsistent with the general understanding of the law in the regulated community, is relevant evidence of Plaintiffs' potential biases and motivations.

B. Plaintiffs, Not Defendants, Have the Burden to Prove That Poultry Litter Has Been Applied In Violation of the Application Rates and Instructions Authorized by Law

The Court should also reject Plaintiffs' effort to shift the burden of proof to Defendants. *See* Mot. at 14.[15] The law requires Plaintiffs—not Defendants—to satisfy the burden of proof with respect to each element of their claims. *See Sierra Club v. Seaboard Farms Inc.*, 387 F.3d 1167, 1169 (10th Cir. 2004). As a result, Plaintiffs—not Defendants—bear the burden of proving that poultry litter has in fact been applied in violation of the law. *See, e.g.*, *Carson Harbor*, 270 F.3d at 870 ("Because [plaintiff] failed to show that the [utilities] violated the

[14] *See, e.g.*, *Pittsley v. Warish*, 927 F.2d 3, 10 (1st Cir. 1991) (admitting evidence of prior criminal charges against Plaintiff that "were probative in demonstrating motive and bias" in bringing the present lawsuit).

[15] This attempt to shift the burden of proof to Defendants is not a new one. *See, e.g.*, Dkt. No. 2119 at 24 (May 29, 2009); Dkt. No. 2131 at 18-19 n.10 (June 2, 2009); Dkt. No. 2166 at 9-10 ¶24 (June 5, 2009). Separately, Plaintiffs' peculiar observation regarding the fact that Defendant companies do not track poultry litter applications hardly prevents defense counsel from making use of materials discovered as part of this lawsuit. *See* Mot. at 12-14.

NPDES permits … any pollutants discharged into the storm water were permissible.").

Here, far from requiring field-specific proof from *Defendants*, Oklahoma law in fact obliges *Plaintiffs* to come forward with plan-by-plan evidence of violations. There can be no dispute that the authors of the AWMPs are required to develop a plan that will satisfy each of Oklahoma's laws and rules against polluting the waters of the State. *See supra* at 5-7. Moreover, each regulated entity—farmers, growers, and applicators—are required to have and to follow such an animal waste management plan. Plaintiffs have suggested that perhaps Oklahoma's plan writers are not effective in designing plans that adequately prevent runoff from the specific fields that they evaluate. However, the law is clear that a "presumption of regularity" applies in such circumstances—courts assume as a baseline that the laws are effective and are being followed, and that public officials are doing their duty in promulgating and enforcing the law. *See Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) (a presumption of regularity applies to "official acts of public officers" allowing court, "[i]n the absence of clear evidence to the contrary," to "presume[] that public officers have properly discharged their official duties") (citing *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926)).[16] Indeed, as the Tenth Circuit has recognized, the "presumption of regularity … is especially strong where," as here, "the challenged decision[] involve[s] technical or scientific matters within the agency's area of expertise." *Utah Envtl. Cong. v. Richmond*, 483 F.3d 1127, 1134 (10th Cir. 2007) (internal quotations omitted). Thus, regardless of whether the AWMPs are a "permit" per

[16] *See Garrett v. State*, 238 P. 846, 849 (Okla. 1925) ("[T]he law presumes that … officers have properly performed their duties and that they have complied with all the forms of law necessary to qualify them to act as they have done, and where some preceding act or pre-existing fact is necessary to the validity of such official acts, the presumption in favor of the validity of the official act is indulged until the contrary is shown."); *Eagle Loan & Inv. Co. v. Turner*, 113 Okla. 251, 252 (1925) ("The general presumption is that public officers perform their official duty, and that their official acts are regular."); *see also Reed v. Ross*, 148 P.2d 782, 783 (Okla. 1944) (same); *Berryman v. Bonaparte*, 11 P.2d 164, 167 (Okla. 1932) (same).

se, Defendant are entitled to a rebuttable presumption that poultry litter applied pursuant to an AWMP satisfies the applicable environmental protections and does not contribute significant pollution to the waters of the State. Plaintiffs, for their part, must adduce evidence on a plan-by-plan basis that either the regulated party violated the terms of the AWMP, or that the plan writer failed to do his or her duty under state law. What Plaintiffs manifestly cannot do is precisely what they are trying to do by shifting the burden to Defendants to prove compliance with the law or simply assuming without proof that Oklahoma's entire poultry litter regulatory apparatus is *per se* ineffective.[17]

CONCLUSION

Because the manner in which Oklahoma regulates the application of poultry litter, the fact that the State issues plans that either do—or are perceived to—authorize the use of poultry litter, and the degree of the State's control over litter application are all central to this lawsuit, the evidence and characterizations to which Plaintiffs object is relevant and admissible. For the foregoing reasons, Plaintiffs' motion in limine should be denied.

[17] Indeed, Plaintiffs have failed to identify any specific evidence of violations of AWMPs. *See* Dkt. No. 2183 at 18-19 n.77; Dkt. No. 2057 at 8 ¶ 24; Dkt. No. 2055 at 4 ¶ 8; Dkt. No. 2033 at 4 ¶ 8; *see, e.g.*, Fisher II Dep. at 560:5-21 (Dkt. No. 2183 Ex. 25); Gunter Dep. at 57:13-61:2, 63:4-12 (Dkt. No. 2183 Ex. 40); Parrish Dep. at 259:19-25 (Dkt. No. 2183 Ex. 38); Traylor Dep. at 41:22-42:6 (Dkt. No. 2183 Ex. 41); Fite Dep. at 120:1-4 (Dkt. No. 2183 Ex. 39); Allen Dep. at 70:18-20 (Dkt. No. 2183 Ex. 17); Berry Dep. at 237:11-15 (Dkt. No. 2183 Ex. 29); Littlefield Dep. at 139:1-13, 141:12-142:5, 153:6-17, 176:24-177:9, 181:22-182:19, 183:25-184:25, 187:14-188:1 (Dkt. No. 2183 Ex. 33); *see also, e.g.*, Dkt. No. 2055 Exs. 10-17. Moreover, in four years of investigation, Plaintiffs' field investigators failed to document any violations of state litter laws. *See* Dkt. No. 2183 at 18-19 n.77; Dkt. No. 2055 at 4 ¶9; Fisher I Dep. at 146:22-149:1 (Dkt. No. 2055 Ex. 24); *see, e.g.*, Steele Dep. at 146:5-7, 148:5-9, 187:1-4, 193:1-4, 193:16-20 (Dkt. No. 2183 Ex. 42); Tuell Dep. at 88:21-23, 90:10-16, 140:25-142:4 (Dkt. No. 2183 Ex. 43); Bracken Dep. at 65:12-18 (Dkt. No. 2183 Ex. 44); Stansill Dep. at 65:14-19, 80:7-10 (Dkt. No. 2183 Ex. 45); Nance Dep. at 32:24-33:2, 78:2-79:1, 87:24-88:2 (Dkt. No. 2183 Ex. 46); Jones Dep. at 31:1-4, 36:5 (Dkt. No. 2183 Ex. 47); Walton Dep. at 42:9-23, 43:23-44:21, 49:5-8, 50:4-6, 52:1-4, 60:13-21, 61:7-12, 81:19-23 (Dkt. No. 2183 Ex. 48); Weatherly Dep. at 77:5-85:15 (Dkt. No. 2183 Ex. 49).

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